CLERK'S COP

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~710~~ 60

J.G. Denman, Administrator &c.

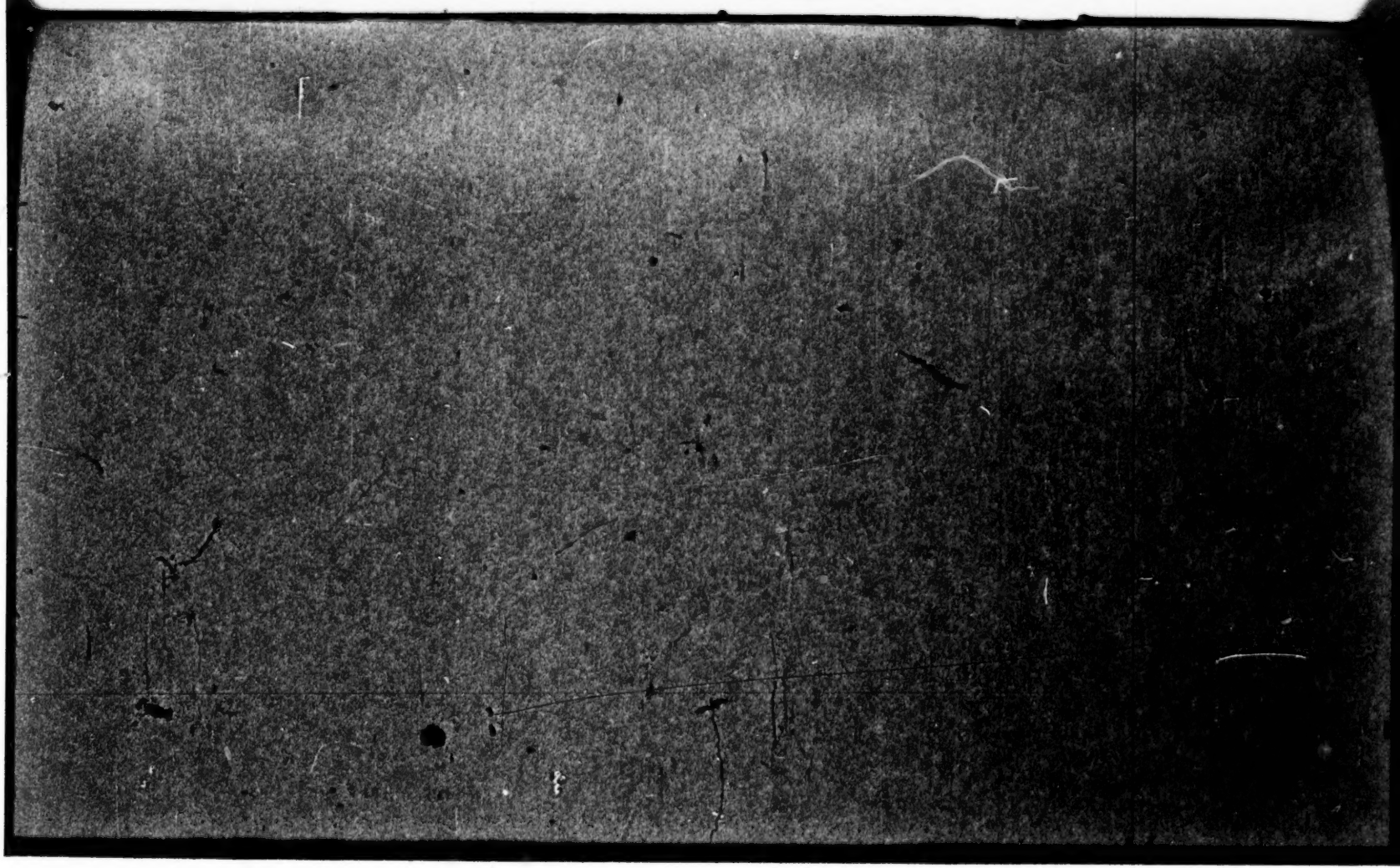
CHARLES H. NAUTS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

W. L. SLAYTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 6, 1930
CERTIORARI GRANTED APRIL 28, 1930



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 719

CHARLES H. NAUTS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

W. L. SLAYTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Northern Ohio	1	1
Caption (omitted in printing)	1	1
Petition	2	1
Præcipe	6	4
Demurrer	6	4
Order overruling demurrer	7	5
Judgment	7	5
Notice of appeal	8	5
Petition for appeal	9	6
Assignment of errors	9	6
Order allowing appeal	10	7
Citation and service (omitted in printing)	11	7
Stipulation re certification of record	13	7
Precipe for transcript of record	13	8
Order extending time for filing transcript of record	14	8
Certificate of clerk (omitted in printing)	15	8
Proceedings in U. S. C. C. A., Sixth Circuit	16	8
Argument and submission	16	8
Judgment	16	9
Opinion, Simons, J	17	9
Motion for order staying mandate	22	13
Order staying mandate	22	14
Clerk's certificate (omitted in printing)	24	14
Order allowing certiorari	25	14

1 In the United States District Court, Northern District of Ohio, Western Division

[Caption omitted.]

W. L. SLAYTON, PLAINTIFF vs. CHAS. H. NAUTS, COLLECTOR OF INTERNAL REVENUE, defendant	In Law. No. 3428

2 *Petition*

Filed Aug. 10, 1928

W. L. Slayton, plaintiff, a resident of Toledo, Lucas County, Ohio, respectfully represents:

(1) The defendant, Charles H. Nauts, is and at the times hereinafter mentioned was the United States internal revenue collector for the tenth district of Ohio, which includes the City of Toledo, Ohio.

(2) This suit arises under the revenue laws of the United States, the amount involved, exclusive of interest and costs, exceeds the sum of $3,000.00.

(3) The plaintiff is now and at the times herein mentioned was engaged individually in the business of buying, selling, and dealing in bonds—particularly municipal bonds—under the name of "W. L Slayton & Company" and has at all times kept his books on an accrual basis.

(4) In the operation of his bond business in 1922, it was necessary to and the plaintiff did borrow money and pay interest thereon for the purpose of purchasing, carrying, and selling notaxable securities, namely, municipal, county, and State bonds. The amount of interest so paid was $78,152.84.

(5) During the year 1922 plaintiff's net income—excluding $65,720.06 tax-exempt interest received from municipal bonds owned by the plaintiff—which was legally taxable under the sixteenth amendment of the United States Constitution was $28,551.94. Plaintiff, making his return for 1922 as required by law, deducted from his gross income the $78,153.84 which he had paid for and in the purchase, carriage, and sale of nontaxable State, county, and municipal bonds as shown in paragraph 4 hereof. Without this deduction and as claimed by the defendant, the plaintiff's net taxable net income would have been $106,704.78. This made a difference in tax and interest of $40,429.53 which is the subject matter of this suit.

(6) Thereafter the internal revenue agents of the United States made examinations of the plaintiff's books and return and made reports dated November 4th, 1926, and February 27th, 1927, as a result of which the deduction of said interest sum, $78,152.84, which had been made by the plaintiff in his return, was disallowed

3 and that amount was added to the plaintiff's net taxable income and an additional tax thereon of $32,606.49 was proposed and said additional tax was thereafter assessed.

(7) Thereafter defendant gave notice and made demand upon plaintiff for payment, which notice and demand stated that if payment was not made within ten (10) days a penalty of 5% of the amount of the tax together with interest at the rate of 1% per month until payment was made would be added, both of which additions were provided for in the act. Said notice also stated that unless said tax was paid within ten (10) days, restraint for the collection of the tax, the additional penalty, and interest would be made.

(8) On August 4th, 1927, the plaintiff, in order to avoid such severe penalties provided for by said act, involuntarily and under written protest, paid to the defendant the sum of $40,384.53, consisting of such additional tax of $32,606.49 and interest amounting to $7,778.04.

(9) On November 23, 1921, Congress passed an income tax law known as the "revenue act of 1921." The United States Government might not then and may not now constitutionally tax the means and instrumentalities of the several States of the United States nor could it tax the income from State or municipal bonds. Aware of this constitutional limitation, Congress, in formal or pretended compliance therewith, in section 213 of the act and in subdivision (b) in paragraph 4 thereof provided for the exemption from such tax of all income from State or municipal bonds by providing in the last-mentioned part of the act for the exclusion from gross income of "(4) Interest upon (a) the obligations of a State, Territory, or any political subdivision thereof."

In the same act and to avoid or nullify the above-shown provisions for the pretended exemption of said municipal bonds from taxation, Congress, in section 214 (a) and 214 (a) (2), unconstitutionally attempted to tax such nontaxable bonds indirectly by providing that interest paid by the taxpayer on account of indebtedness incurred in purchasing and carrying such municipal bonds during the tax year was not deductible as an ordinary and necessary expense in carrying on business although interest paid on such an indebtedness for taxable bonds was made deductible. The pertinent parts of the act above referred to are as follows:

4 "SEC. 214 (a). That in computing net income there shall be allowed as deductions:

"SEC. 214 (a) (2). All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title."

(10) Said section 214 (a) (2) is unconstitutional in that, by its necessary operation, it discriminates against the owners of nontaxable securities and nullifies the immunity from taxation of the

means and instrumentalities of the State and income derived from State or municipal bonds in violation of the due-process clause of the fifth amendment of the Constitution.

(11) The act is also discriminatory and unconstitutional in that in all other kinds of business all such operating expense as interest paid for purchasing and carrying merchandise and inventories are allowed as part of the cost of doing business, whereas the deduction of interest paid by plaintiff and others similarly situated to purchase and carry nontaxable securities, though such interest is in fact an ordinary and necessary operating expense, is prohibited, all of which is contrary to the due process of law and inviolability of private property clauses of the fifth amendment to the Constitution.

(12) The act is also arbitrary, discriminatory, and unconstitutional in that it discriminates against plaintiff and others similarly situated whose resources and capital do not permit them to purchase such tax-free securities for cash and in favor of those whose resources and capital permit them to purchase and carry such securities without borrowing or who have securities other than State or municipal bonds which they can pledge and thereby borrow money to purchase and carry such State and municipal bonds, though in fact the money borrowed and other securities pledged are actually used to carry on the business of buying, carrying, and selling municipal bonds, all of which discrimination is without reasonable reference to any classifiable distinction—in fact or legal effect—between the two methods of conducting the same kind of business and the taxable incomes produced thereby, contrary to and in violation of said provisions of the fifth amendment.

(13) On December 23, 1927, the plaintiff duly filed with the Commissioner of Internal Revenue a claim for the refund of said $40,384.53. Said claim was rejected and refused on January 31, 1928. The Commissioner of Internal Revenue continued to reject and refuse said claim up to the time of filing this petition and said plaintiff is without remedy in the Treasury Department of the United States.

(14) No action has been had on said claim in Congress nor in the department except as aforesaid. No person other than the plaintiff is the owner of said claim or interested therein; no assignment or transfer of this claim or any part thereof or interest therein has been made, and the plaintiff is justly entitled to the amount herein claimed.

(15) The imposition of such additional tax and the collection thereof and the rejection of the plaintiff's claim for refund, as aforesaid, were all without warrant or authority of law, repugnant to the Constitution of the United States in the particulars above stated and in violation of the plaintiff's substantial constitutional rights, as a result of which this plaintiff is now entitled to recover said sum of $40,384.53 with interest thereon at 6% from the time of plaintiff's payment thereof to the defendant on August 4, 1927.

Wherefore, plaintiff prays judgment against the defendant, Charles H. Nauts, collector of internal revenue for the tenth district of Ohio, in the sum of forty thousand three hundred eighty-four and 53/100 dollars ($40,384.53) with interest at six per cent (6%) from August 4, 1927.

MARSHALL, MELHORN, MARLAR & MARTIN,
THOS. O. MARLAR,
Attorneys for Plaintiff.

[*Duly sworn to by W. L. Slayton; jurat omitted in printing.*]

6 *Pracipe*

To the CLERK:

Please issue subpoena against defendant, Charles H. Nauts, as collector of internal revenue for the tenth district of Ohio, addressed to the United States marshal for the northern district of Ohio, returnable according to law, endorsed: "Action for money only, amount $40,384.53 with interest at 6% from August 4, 1927."

THOS. O. MARLAR,
Attorney for Plaintiff.

In United States District Court

Demurrer

Filed Sept. 13, 1928

Now comes the defendant, Charles H. Nauts, collector of internal revenue, by Harry G. Levy, assistant United States attorney, and demurs to the petition of plaintiff heretofore filed herein, for the reason that said petition fails to set forth a cause of action.

CHARLES H. NAUTS,
Collector of Internal Revenue.
By HARRY G. LEVY,
Assistant U. S. Attorney.

7 Overruled with exceptions. We hold that to construe par. 2 of section 2114 (a) of the revenue act of 1921 as applicable in terms or spirit to the fact admitted by the demurrer to exist, to make the enactment unconstitutional, under National Life Insurance Co. vs. U. S., 274 U. S., 734. The statute is competent to sustain a reasonable construction to avoid unconstitutionality. Wherefore we hold that it does not apply to the admitted facts. Judgment for plaintiff on demurrer overruled ordered with the usual certificate of reasonable cause.

JOHN M. KILLITS, *Judge.*

JAN. 4, 1929.

In United States District Court

Order overruling demurrer

Jan. 4, 1929

This day this cause came on to be heard upon the demurrer to the petition of the plaintiff, heretofore filed herein. And the court, upon consideration thereof, overruled said demurrer to which action of the court the defendant, by his counsel, excepts.

In United States District Court

Judgment

Filed Jan. 10, 1929

This cause being heard this day upon the demurrer of the defendant to the petition of the plaintiff and the court being fully advised in the premises, is of the opinion and does therefore order that said demurrer be and the same is hereby overruled, to which ruling of the court the defendant excepts.

8 The court further finds that there was probable cause for the collection by the defendant of the amounts involved in this cause.

It is therefore considered by the court that the plaintiff, W. L. Slayton, have and recover from the defendant, Charles H. Nauts, collector of internal revenue, the sum of $43,837.41, together with costs herein expended.

GEO. P. HAHN,
U. S. District Judge.

Approved
H. G. LEVY,
Assist. U. S. Atty.

In United States District Court

Notice of appeal

Filed Apr. 9, 1929

Please take notice that the above named defendant, Charles H. Nauts, as collector of internal revenue of the United States for the tenth district of Ohio, appeals from the judgment of the District Court of the United States for the Northern District of Ohio, Western Division, in the above entitled case.

Dated, Toledo, Ohio, April 9, 1929.

LEE N. MURLIN,
Assistant United States Attorney,
Attorney for Defendant.

TOLEDO, OHIO, *April 9, 1929.*

Service upon the undersigned as attorney of record of the above plaintiff, W. L. Slayton, in the above entitled cause of the foregoing notice of defendant's appeal from the judgment heretofore rendered in said cause is hereby acknowledged.

THOS. O. MARLAR,
Attorney of Record for Plaintiff, W. L. Slayton.

9 In United States District Court

Petition for Appeal

Filed April 9, 1929

To the Hon. GEORGE P. HAHN,
Judge of the District Court for the
Northern District of Ohio, Western Division.

The above-named defendant, Charles H. Nauts, as collector of internal revenue of the United States for the tenth district of Ohio, feeling aggrieved by the order overruling demurrer of defendant and the judgment rendered and entered in the above-entitled cause on the 10th day of January, 1929, does hereby appeal from said order and judgment to the foregoing circuit court of appeals for the sixth circuit for the reasons set forth in the assignment of errors heretofore filed herein and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which such said order and judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Sixth Circuit under the rules of such court in such case made and provided.

LEE N. MUELLIN,
Assistant United States Attorney,
Attorney for Defendant.

In United States District Court

Assignment of Errors

Filed April 9, 1929

Now comes Charles H. Nauts, as collector of internal revenue of the United States for the tenth district of Ohio, defendant in this cause, and in connection with his appeal, says that in the record, proceedings, findings of fact, conclusion of law, and final judgment of this cause manifest errors intervene to the prejudice of this defendant, to wit:

First. That the court erred in holding that the provisions of paragraph 2 of section 214 (a) of the revenue act of 1921 do not apply to the admitted facts in the cause herein.

10 Second. That the court erred in holding paragraph 2 of section 214 (a) of the revenue act of 1921 unconstitutional when applied to the admitted facts in the cause herein.

Third. That the court erred in overruling the demurrer filed by defendant to plaintiff's petition.

Fourth. That the court erred in rendering judgment for plaintiff against defendant.

Wherefore, this plaintiff prays that the judgment entered herein be reversed.

WILFRED J. MAHON,
United States Attorney.

LEE N. MULLIN,
Assistant U. S. Attorney.

In United States District Court

Order Allowing Appeal

April 9, 1929

On motion of Lee N. Murlin, assistant United States attorney, attorney for Charles H. Nauts, as collector of internal revenue of the United States for the tenth district of Ohio.

It is hereby ordered that an appeal to the circuit court of appeals of the sixth circuit from the judgment heretofore entered herein be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said circuit court of appeals.

11–12 [Citation in usual form showing service on W. L. Slayton omitted in printing.]

13 In United States District Court

Stipulation re certification of record

Filed Apr. 13, 1929

In accordance with section 7 of rule 44 of the general rules of this court,

It is hereby agreed that the record as presented to the clerk by the printer, may be certified by the clerk as required by law and the rules of the appellate court, as a true, full, and complete copy of the original pleadings, papers, and orders used on the trial of this cause, as set forth in the praecipe for transcript, without further comparison by the clerk.

THOS. O. MARLAR,
Attorney for Plaintiff.
LEE N. MURLIN,
Attorney for Defendant.

In United States District Court

Precipe for transcript of record

Filed May 4, 1929

To the CLERK:

Please prepare transcript of record for the United States Circuit Court of Appeals, Sixth Circuit, in the above-entitled cause, including therein the following papers and orders:

Caption.
Petition.
Demurrer to petition.
Order overruling demurrer.
Order of final judgment for plaintiff.
Petition for appeal.
Order allowing appeal.
Notice of appeal and acknowledgment of service thereof by attorney of record for plaintiff.

14 Assignment of errors.

Citation including acknowledgment of service thereof by attorney of record for plaintiff.
Praecipe for transcript.
Any entries extending time in which to file printed record in court of appeals, if such entries should be filed.
Stipulation re certification of record.
Certification of clerk.

LEE N. MURLIN,
Attorney for Defendant.
CHAS. H. NAUTS,
Collector of Internal Revenue.

In United States District Court

Order extending time for filing transcript of record

May 8, 1929

For good cause shown, it is hereby ordered that the time for filing the record in the circuit court of appeals for the sixth circuit in the above-entitled cause be extended to June 7, 1929.

15 [Clerk's certificate to foregoing transcript omitted in printing.]

16 In United States Circuit Court of Appeals, Sixth Circuit

Cause argued and submitted November 6, 1929, before MOORMAN, HICKS and SIMONS, JJ.

This cause is argued by Ottamar Hanele for appellant and by Thos. O. Marlar for appellee and is submitted to the court.

In United States Circuit Court of Appeals

Judgment

Filed Dec. 6, 1929

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

17 [File endorsement omitted.]

No. 5437

In United States Circuit Court of Appeals, Sixth Circuit

CHARLES H. NAUTS, COLLECTOR OF INTERNAL REVENUE, appellant, v. W. L. SLAYTON, APPELLEE.	Appeal from the United States District Court, Northern District of Ohio, Western Division.

Decided December 6, 1929

Before MOORMAN and HICKS, Circuit Judges, and SIMONS, District Judge.

Opinion

Filed Dec. 6, 1929

SIMONS, District Judge: This action is to determine the applicability of provisions of the revenue act of 1921, to admitted facts, and their constitutionality as applied. For convenience plaintiff in the court below, and appellee here, will be referred to as the taxpayer; the defendant below as the collector.

During the year 1922 the taxpayer was engaged in the business of buying, selling and dealing in municipal bonds. During that year he received as interest from bonds owned by him $65,720.06. During the same period he paid as interest on money borrowed to buy and carry such bonds the sum of $78,153.84. In his return for the year he excluded from his gross income the interest from the bonds, for the reason that such income was exempt. He deducted interest paid during the year and set it off against profit made upon the sale of bonds. Upon audit of his return, the Treasury Department disallowed the deduction of interest paid and assessed additional taxes based upon a recomputation of his income

after the disallowance of such deduction. These additional taxes were paid. Claim for refund was duly filed and rejected,
18 and the taxpayer sued for the purpose of recovering the paid additional tax. To the taxpayer's petition the defendant demurred. The court overruled the demurrer, and upon failure of the collector to plead entered judgment in favor of the taxpayer and as against the collector for the amount claimed. This appeal is taken by the collector to review the judgment.

The Treasury Department in disallowing the taxpayer's deduction of interest paid, and in assessing an additional tax, assumed to act under the authority of sections 213 and 214, of the revenue act of 1921. Section 213, defining gross income, specifically exempts interest upon obligations of a State, Territory, or any political subdivision thereof. Section 214a provides that in computing net income there shall be allowed as deductions,

"2. All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities, * * * the interest upon which is wholly exempt from taxation under this title."

The taxpayer bases his right to recovery upon two main contentions. First, that he is not an investor in tax-exempt securities, but a dealer; that the section is intended to reach only those who invest in tax exempt securities for the purpose of producing non-taxable income, and that as his primary purpose is to produce taxable income, to wit, the profits made upon the purchase and sale of tax-exempt securities, and that as such primary purpose is set up in his petition and admitted by the demurrer, section 214-a-2 is not applicable to him. Furthermore, that in his case the interest paid ought not to be treated purely as interest, but as one of the [illegible] and necessary expenses of doing business, to be deducted from gross income in order to ascertain his net income. Secondly, that if the statute is applicable to him, it is unconstitutional, as imposing a burden upon the obligations and securities of a State or its political subdivision.

The district judge held that the statute did not apply to admitted facts; that so to apply it would make the enactment unconstitutional, and that it is susceptible to a construction to avoid unconstitutionality. Were there any ambiguity in the language of the section, such rule of statutory construction might be here considered, but we find none. The terms of the section are plain, and being
19 clear the letter of the law must control. We pass over also without detailed consideration the contention that the interest paid must be treated not as pure interest, but as one of the elements in the cost of doing business. Even were we to consider that there are here present the special circumstances under which interest may be treated as among the "ordinary and necessary expenses" suggested by the Supreme Court in *Anderson v. 32 Broadway Company*, 239 U. S. 69, it is clear from the circumstances of this particular

case that the only interest paid that could be so treated would be the excess of interest paid over the amount of interest received. Manifestly this is not the interest here in question, nor upon the disallowance of which this suit is based. The taxpayer herein is seeking to recover all of the additional tax computed upon the disallowance of a deduction of all of the interest paid.

We come then to the disputed constitutionality of the statute. The taxpayer relies upon and the collector challenges the holding of the Supreme Court in National Life Insurance Company v. United States, 277 U. S. 508, as authority for the invalidity of the section herein considered. In that case the court was called upon to deal with section 245–a of the revenue act of 1921. That section provided:

"a. That in case of a life insurance company the term net income means the gross income less—

1. The amount of interest received during the taxable year which under paragraph (4) of subdivision (c) of section 213 is exempt from taxation under this title (interest on tax exempt securities);

2. An amount equal to the excess, if any, over the deductions specified in paragraph (1) of this subdivision of four per centum of the mean of the reserve fund required by law and held at the beginning and end of the taxable year."

The petitioner there maintained that the result of the collector's action in deducting from the four per cent of the mean of the reserve fund an amount equivalent to the company's income from tax exempt securities was unlawfully to discriminate against it and really to exact payment on account of its exempt securities, contrary to the Constitution and laws of the United States, and also that diminution of the ordinary deduction of four per cent of the reserve because of interest received from tax exempt securities in effect defeated the exemption guaranteed to their owners. The court held that one may not be subjected to greater burdens upon his taxable property solely because he owns some that is free. No device or form of words can deprive him of the exemption for which he has lawfully contracted. Also, that the Congress has no power purposely and directly to tax State obligations by refusing to their owners deductions allowed to others.

The collector here seeks to distinguish the situation with respect to tax exempt securities provided for in section 245 from that in section 214. He contends that the statute involved in the insurance company case gives to all taxpayers exactly the same deduction; that no one is entitled to deduct the interest which he pays to purchase or carry municipal bonds, and on the other hand, that everyone is entitled to deduct all other interest. In our judgment the situation created by the two sections with respect to the taxation of tax exempt securities is the same, and the applicable principle identical. To deprive the taxpayer of the right to deduct from gross income

interest that he has paid during the taxable year because that interest was paid on money borrowed to purchase tax exempt securities is, looking through form to substance, directly to tax the interest of such securities, and so not within the power of Congress to authorize. It is important to note that the Supreme Court in the National Life Insurance case considered the deduction of tax exempt interest from the four per cent allowance a direct and purposeful tax upon a State obligation, and did not rely upon any rule to the effect that what Congress may not do directly it can not do indirectly. This renders unnecessary a consideration of those cases wherein the exercise of the congressional authority to tax more or less remotely affected the sale of State securities, or remotely or incidently impaired the borrowing power of the State. Typical of such cases is Plummer v. Coler, 178 U. S. 115; Florida v. Mellon, 273 U. S. 12. As we shall see presently, the tax in the instant case is even more obviously a direct tax upon the income of State obligations than was the tax in the insurance case.

In the latter it was argued in able dissenting opinions that the four per cent deduction allowed to insurance companies was not given to them as a matter of right; that the allowance of a deduction of four per cent of the mean of the reserve was, as Mr. Justice Brandeis put it, a favor, and as Mr. Justice Stone expressed it, a matter of grace, or a bounty, and in their dissenting opinions (Mr. Justice Holmes concurring with Justice Brandeis), they saw no constitutional reason why in granting a favor or a bounty the Congress could not lawfully take into consideration an exemption already possessed by the holders of tax exempt securities, every insurance company holding such tax exempts being already permitted by the statute to deduct the interest therefrom to the full extent received. In the instant case there is involved no such act of grace on the part of the Congress. There is taken from the taxpayer something which every other taxpayer is allowed, namely the privilege of deducting interest on borrowed money from gross income. It is not a case of making him a gift, and then adjusting the size of the gift to that which he already possesses. To refuse to allow the taxpayer to deduct his interest in effect results in the taxation of something which is not income. We do not here question the power of Congress to make gross income the criterion of a taxpayer's liability, but this it has not done. The settled policy of the Government, in this and other income tax statutes, has been to make net income measure the taxpayer's liability.

In arriving at the conclusion indicated we have not been at all influenced by the holding in Bunn v. Willcuts, collector, 29 Fed. (2nd) 132, a decision of the District Court of the District of Minnesota, to which the taxpayer has specifically called our attention. In that case there was a holding that not only was the interest from municipal securities exempt from Federal taxation, but also that

profit made from the purchase and sale of such securities is likewise exempt. Even were we to consider the question as not foreclosed by the holdings of the Supreme Court in Plummer v. Coler, 178 U. S. 115; Orr v. Gilman, 183 U. S. 278, it is not now before us. Here no question is raised as to the taxability of profits made in the purchase and sale of municipal bonds. Such profit was included in gross income, and the tax paid upon it is not herein sought to be recovered. Indeed the petitioner's argument in support of the contention that the statute does not apply to him is founded upon the claim that the primary purpose of his borrowing was to produce taxable income, and not tax-exempt income.

In view of section 1403, of the act, it is necessary to go no further than did the court in the National Life Insurance case, and so to hold that the disallowance of interest paid and the additional tax assessed against the taxpayer based upon such disallowance cannot be given effect as against the taxpayer under the circumstances here disclosed He was lawfully entitled to the judgment obtained in the court below, and

It is hereby affirmed.

22 In the United States Circuit Court of Appeals

Motion for order staying mandate

Filed Jan. 4, 1930

Now comes the appellant by his counsel, Lehr Fess, assistant United States attorney for the northern district of Ohio, and shows the court that consideration is now being given by the office of the Attorney General of the United States to the question of filing a petition for writ of certiorari in the above case prior to the 6th day of January, 1930, on which day mandate is to be issued by this court, and respectfully moves the court for an order in the above case staying the issuance of the mandate herein for a period of three months from December 6, 1929, in accordance with the practice of the court.

CHARLES H. NAUTS.
Collector of Internal Revenue.
By LEHR FESS.
Assistant U. S. Attorney.

Service of copy of the above application for order staying mandate is hereby acknowledged, together with consent to the allowance of such application.

THOS. O. MARLAR,
MARSHALL, MELHORN, MARLAR & MARTIN,
Attorneys for Appellee.

In United States Circuit Court of Appeals

Order staying mandate

Filed Jan. 6, 1930

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for sixty days from this date; provided that, if within such sixty days, the applicant shall file with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed and that proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given, the stay shall continue until
23 the final disposition of the case by the Supreme Court. Unless this condition is complied with within such sixty days or any extension thereof made by the court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.
24 [Clerk's certificate to foregoing transcript omitted in printing.]

25 Supreme Court of the United States

Order allowing certiorari

Filed April 28, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34850. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 719. Charles H. Nauts, collector of internal revenue, petitioner, vs. W. L. Slayton. Petition for writ of certiorari and exhibit thereto. Filed March 6, 1930. File No. 34850.